

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

INVENERGY THERMAL LLC, and  
GRAYS HARBOR ENERGY LLC,

Plaintiffs,

v.

LAURA WATSON, in her official  
capacity as Director of the Washington  
State Department of Ecology,

Defendant.

CASE NO. 3:22-cv-05967-BHS

ORDER

This matter is before the Court on Defendant Washington State Department of Ecology's<sup>1</sup> Federal Rule of Civil Procedure 12(c) motion for judgment on the pleadings,<sup>2</sup> Dkt. 21. Plaintiff Invenergy Thermal LLC alleges that, through a subsidiary of a

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<sup>1</sup> The named defendant is Laura Watson, who is sued in her official capacity as the director of the Department of Ecology. For clarity, the Court refers to the defendant as the Department of Ecology.

<sup>2</sup> Ecology captioned this motion as a "FRCP 12(c) Motion to Dismiss." Dkt. 21 at 1. Because this motion is made pursuant to Fed. R. Civ. P. 12(c) and Ecology filed an answer, Dkt. 20, the Court refers to it as a motion for judgment on the pleadings.

Also, each party requests oral argument on this motion. Dkt. 21 at 1, Dkt. 27 at 1. These requests are **DENIED**.

1 subsidiary, it “wholly owns” Plaintiff Grays Harbor Energy LLC, which, in turn, “wholly  
2 owns” the Grays Harbor Energy Center—an electricity-generating natural gas power  
3 plant located in Washington State. Dkt. 1, ¶¶ 3, 4.

4 Plaintiffs challenge a provision of Washington’s Climate Commitment Act (CCA),  
5 chapter 70A.65 RCW, which directs Ecology to allocate to electric utilities—at no cost—  
6 allowances to emit a certain amount of greenhouse gases per year. Owners of electricity  
7 generating facilities like the Grays Harbor Energy Center, by contrast, must purchase  
8 such allowances at auction. Plaintiffs claim that the CCA’s allocation of “no-cost  
9 allowances”<sup>3</sup> to electric utilities, but not to owners of electricity generating facilities like  
10 the Grays Harbor Energy Center, violates the dormant Commerce Clause and the  
11 Fourteenth Amendment’s Equal Protection Clause.

12 Plaintiffs argue that this statutory scheme discriminates against them in violation  
13 of the dormant Commerce Clause because Invenergy is an out-of-state entity and,  
14 according to Plaintiffs, the electric utilities that receive no-cost allowances are all owned  
15 by in-state entities. Plaintiffs assert that the Grays Harbor Energy Center competes  
16 against these utilities insofar as the utilities operate their own electricity generating  
17 facilities. Plaintiffs similarly claim that the CCA violates the Equal Protection Clause by  
18 treating electricity generating facilities differently than electric utilities without a rational  
19 basis to do so.

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22 <sup>3</sup> The parties refer to allowances allocated at no cost as “no-cost allowances.” *See* Dkt. 1,  
¶ 6; Dkt. 21 at 2–3; Dkt. 27 at 6. So does the Court.

1 Ecology responds that, far from being discriminatory, the CCA allocates no-cost  
2 allowances to in-state entities and out-of-state entities alike. It also contends that  
3 electricity generating facilities like the Grays Harbor Energy Center are not substantially  
4 similar to electric utilities. This is so, Ecology asserts, because electric utilities sell  
5 electricity to the public on the retail market whereas electricity generating facilities sell  
6 electricity to larger entities, including electric utilities, on the wholesale market. Ecology  
7 finally argues that the challenged statute serves a legitimate governmental interest: to  
8 mitigate the cost of electricity sold to public consumers while electric utilities make  
9 efforts to reduce their greenhouse gas emissions.

10 The Court concludes that Invenergy lacks constitutional standing to advance its  
11 claims under both the dormant Commerce Clause and the Equal Protection Clause. This  
12 is because Invenergy does not own the Grays Harbor Energy Center; a subsidiary three  
13 degrees separated from itself does. Grays Harbor Energy LLC also lacks standing to  
14 advance its asserted dormant Commerce Clause claims. Unlike Invenergy, Grays Harbor  
15 Energy LLC is an in-state entity without any out-of-state economic interests of its own.  
16 Under these circumstances, it cannot allege a plausible injury in fact under the dormant  
17 Commerce Clause, which, at its core, serves to prevent discrimination against out-of-state  
18 economic interests.

19 Even if Invenergy or Grays Harbor Energy LLC had standing to advance their  
20 dormant Commerce Clause claims, these claims would still fail. Under the CCA, there is  
21 one out-of-state owner of an electric utility in Washington that is entitled to no-cost  
22 allowances, and two other in-state owners of electricity generating facilities that are not

1 so entitled. Thus, the CCA does not discriminate based on an entity's local contacts. At  
 2 most, it discriminates based on an entity's status as either an electric utility or an  
 3 electricity generating facility. Because these entities primarily serve different markets,  
 4 they are not similarly situated and the CCA's differing treatment of them does not offend  
 5 the dormant Commerce Clause.

6 Simply put, the CCA treats all owners of electric utilities the same, regardless of  
 7 whether those owners are in-state entities or out-of-state entities. It also treats all owners  
 8 of electricity generating facilities the same, again regardless of an owner's location. This  
 9 plainly does not discriminate against out-of-state economic interests.

10 For this same reason, the CCA also does not violate the Equal Protection Clause,  
 11 which generally requires similarly situated persons to be treated alike. In any event, as  
 12 Ecology asserts, the allocation of no-cost allowances to electric utilities, but not to  
 13 electricity generating facilities like the Grays Harbor Energy Center, is rationally related  
 14 to a legitimate governmental purpose.

## 15 I. BACKGROUND

16 Invenergy Thermal LLC "is an independent power producer that owns and  
 17 operates power plants across the United States." Dkt. 1, ¶ 1. It is incorporated in  
 18 Delaware and headquartered in Chicago, Illinois. *Id.*

19 Invenergy, "*through other subsidiaries*, wholly owns Grays Harbor Energy LLC,  
 20 which wholly owns the Grays Harbor Energy Center, a power plant located in  
 21 Washington." Dkt. 1, ¶ 3 (emphasis added). Specifically, "Grays Harbor Energy LLC is a  
 22 wholly owned subsidiary of Invenergy Grays Harbor LLC," which, in turn, "is a wholly

1 owned subsidiary of Invenergy Grays Harbor Holdings LLC,” which, again in turn, “is a  
2 wholly owned subsidiary of Invenergy.” *Id.* ¶ 20 n.2.

3 The record does not indicate where these two “intermediate subsidiaries” are  
4 incorporated, headquartered, or otherwise conduct their businesses. However, Grays  
5 Harbor Energy LLC is incorporated in Delaware and headquartered in Elma,  
6 Washington. Dkt. 1, ¶ 20.

7 In 2021, the Washington Legislature enacted the CCA to address certain impacts  
8 of climate change on the State. *See* RCW 70A.65.005. To aid “covered entities”<sup>4</sup> in  
9 reducing their greenhouse gas emissions, the CCA requires Ecology to implement a cap  
10 and invest program concerning such emissions. RCW 70A.65.060(1); *see* RCW  
11 70A.65.010(58) (defining “[p]rogram” as “the greenhouse gas emissions cap and invest  
12 program”). The parties agree that the Grays Harbor Energy Center is a “covered entity”  
13 and thus subject to the cap and invest program. Dkt. 1, ¶ 22; Dkt. 21 at 4.

14 Under this program, Ecology must (1) implement a cap on greenhouse gas  
15 emissions from covered entities, RCW 70A.65.060(1), and (2) distribute “allowances”—  
16 meaning, “an authorization to emit up to one metric ton of carbon dioxide equivalent,”  
17 RCW 70A.65.010(1)—through auctions open to “covered entities, opt-in entities, and  
18 general market participants that are registered entities in good standing.” RCW  
19 70A.65.100(4). The CCA requires Ecology to “adopt by rule an auction floor price” for  
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21 <sup>4</sup> Under the CCA, “[c]overed entity” means a person that is designated by the department  
22 as subject to RCW 70A.65.060 through 70A.65.210.” RCW 70A.65.010(23). Ecology’s  
regulations define covered entities generally as those whose covered emissions exceed 25,000  
metric tons of “carbon dioxide equivalent” per year. *See* WAC 173-446-030; WAC 173-446-060.

1 these allowances and prohibits Ecology from “sell[ing] allowances at bids lower than the  
 2 auction floor price.” RCW 70A.65.150(1). Ecology must also “adopt by rule . . . a  
 3 schedule for the floor price to increase by a predetermined amount every year.” *Id.*

4 However, the following categories of entities must receive an allocation of  
 5 allowances at no cost: (1) “emissions-intensive and trade-exposed” facilities;<sup>5</sup> (2)  
 6 “consumer-owned and investor-owned electric utilities”; and (3) “covered entities that are  
 7 natural gas utilities.” RCW 70A.65.110–.130. Although the Grays Harbor Energy Center  
 8 generates electricity and participates in an electricity market, Plaintiffs acknowledge that  
 9 it is not an electric utility.<sup>6</sup> *See* Dkt. 1, ¶ 7. Accordingly, the Grays Harbor Energy Center  
 10 does not qualify for no-cost allowances under the CCA. *See* Dkt. 1, ¶ 7; Dkt. 21 at 5; Dkt.  
 11 27 at 6.

12 Concerning electric utilities, the purpose of these no-cost allowances is “to  
 13 mitigate the cost burden of the [cap and invest] program on electricity customers.” RCW  
 14 70A.65.120(1). The availability of no-cost allowances to electric utilities reduces over  
 15 time and “[u]nder no circumstances may utilities receive any free allowances after 2045.”  
 16 RCW 70A.65.120(2)(d).

17 In these respects, the CCA works in tandem with another Washington statute, the  
 18 Clean Energy Transformation Act (CETA), chapter 19.405 RCW. CETA requires all

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19 <sup>5</sup> Emissions-intensive and trade-exposed facilities include entities that engage in  
 20 petroleum refining or numerous forms of manufacturing. RCW 70A.65.110(1)(a)–(m). They do  
 not include entities that generate, sell, or distribute electricity. *See id.*

21 <sup>6</sup> Electric utilities sell and distribute electricity to the public on the retail market. Dkt. 1, ¶  
 22 7. Electricity generating facilities do not. *See id.* They instead sell electricity on the wholesale  
 market, which includes selling electricity to electric utilities. *See id.*

1 electric utilities in Washington to become “one hundred percent carbon-neutral by 2030,  
2 and one hundred percent carbon-free by 2045.” RCW 19.405.010(2). Consistent with the  
3 CCA’s goal of mitigating the cost burden of its cap and invest program on electricity  
4 customers, *see* RCW 70A.65.120(1), CETA provides that “the state must,” among other  
5 things, “provide safeguards to ensure that the achievement of this policy does not . . .  
6 impose unreasonable costs on utility customers.” *Id.* Because the Grays Harbor Energy  
7 Center is not an electric utility, it is not subject CETA’s requirements. *See generally*  
8 chapter 19.405 RCW; *see also* Dkt. 21 at 5; Dkt. 27 at 21.

9       Plaintiffs allege that Ecology’s allocation of no-cost allowances under the CCA to  
10 electric utilities, but not to electricity generating facilities like the Grays Harbor Energy  
11 Center: (1) violates the dormant Commerce Clause “by discriminating in effect against  
12 out-of-state economic interests to the benefit of in-state economic interests,” Dkt. 1, ¶  
13 157, (2) violates the dormant Commerce Clause by “excessively burden[ing] interstate  
14 commerce without advancing any legitimate local interest,” *id.* ¶ 174, and (3) violates the  
15 Equal Protection Clause of the Fourteenth Amendment by “treat[ing] independent power  
16 plant owners differently from other similarly situated plant owners, namely local  
17 utilities,” in a manner that “is not rationally related to any legitimate governmental  
18 purpose.” *Id.* ¶ 187.

19       Plaintiffs seek a judicial determination that the CCA’s requirement that Ecology  
20 allocate no-cost allowances to electric utilities, but not to electricity generating facilities  
21 like the Grays Harbor Energy Center, is unconstitutional “as applied.” Dkt. 1, ¶ 194.  
22 Plaintiffs also seek an order “[r]equir[ing] Defendant . . . to provide no-cost allowances to

1 Plaintiffs, or requir[ing] Defendant . . . to re-allocate no-cost allowances or requir[ing]  
 2 electric utilities to transfer no-cost allowances to Plaintiffs; or otherwise enjoin[ing]  
 3 Defendant . . . from enforcing the CCA to disadvantage Plaintiffs.” *Id.* ¶ 195.

4 Ecology filed an answer, Dkt. 20, and subsequently moved for judgment on the  
 5 pleadings under Fed. R. Civ. P. 12(c), Dkt. 21. Plaintiffs oppose this motion. Dkt. 27. The  
 6 parties’ arguments are addressed below.

## 7 II. DISCUSSION

### 8 A. Federal Rule of Civil Procedure 12(c) Standard

9 Federal Rule of Civil Procedure 12(c) “is ‘functionally identical’ to Rule 12(b)(6)  
 10 and . . . ‘the same standard of review’ applies to motions brought under either rule.”

11 *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir.  
 12 2011) (quoting *Dworkin v. Hustler Mag. Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989)).

13 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal  
 14 theory or the absence of sufficient facts alleged under a cognizable legal theory.

15 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). A plaintiff’s  
 16 complaint must allege facts to state a claim for relief that is plausible on its face. *Ashcroft*  
 17 *v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has “facial plausibility” when the party  
 18 seeking relief “pleads factual content that allows the court to draw the reasonable  
 19 inference that the defendant is liable for the misconduct alleged.” *Id.*

20 Although courts must accept as true the complaint’s well-pleaded facts,  
 21 conclusory allegations of law and unwarranted inferences will not defeat an otherwise  
 22 proper Rule 12(b)(6) motion to dismiss. *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246,

1 1249 (9th Cir. 2007); *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.  
 2 2001). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’  
 3 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
 4 cause of action will not do. Factual allegations must be enough to raise a right to relief  
 5 above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
 6 (citations omitted). This requires a plaintiff to plead “more than an unadorned, the-  
 7 defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*,  
 8 550 U.S. at 555).

9 When granting a Rule 12(b)(6) motion to dismiss, “a district court should grant  
 10 leave to amend even if no request to amend the pleading was made, unless it determines  
 11 that the pleading could not possibly be cured by the allegation of other facts.” *Cook*,  
 12 *Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990). Courts  
 13 may also deny leave to amend when the facts are not in dispute and the sole issue is  
 14 whether there is liability as a matter of substantive law. *Albrecht v. Lund*, 845 F.2d 193,  
 15 195–96 (9th Cir. 1988).

16 **B. The proper test for determining whether a state law violates the dormant**  
 17 **Commerce Clause.**

18 The Court begins by clarifying the proper test to be applied when determining  
 19 whether a particular state law violates the dormant Commerce Clause.

20 The Commerce Clause grants Congress the “Power . . . To regulate Commerce . . .  
 21 among the several States.” U.S. CONST. art. I, § 8, cl. 3. “[T]he Commerce Clause not  
 22 only vests Congress with the power to regulate interstate trade; the Clause also

1 ‘contain[s] a further, negative command,’ one effectively forbidding the enforcement of  
 2 ‘certain state [economic regulations] even when Congress has failed to legislate on the  
 3 subject.’” *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 368 (2023) (quoting  
 4 *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)). “This  
 5 ‘negative’ aspect of the Commerce Clause” is “generally known as ‘the dormant  
 6 Commerce Clause.’” *Tenn. Wine & Spirits Retailers Association v. Thomas*, 588 U.S.  
 7 \_\_\_, \_\_\_, 139 S. Ct. 2449, 2459 (2019) (some internal quotation marks omitted) (quoting  
 8 *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)).

9 Plaintiffs and Ecology assert that courts apply a two-tiered test for determining  
 10 whether a particular state law violates the dormant Commerce Clause. Dkt. 21 at 7–8;  
 11 Dkt. 27 at 14. Under the first tier, they claim, courts consider whether a state law  
 12 discriminates against out-of-state entities on its face, in its purpose, or in its practical  
 13 effect. Dkt. 21 at 8 (citing *Int’l Franchise Ass’n, Inc. v. City of Seattle*, 97 F. Supp. 3d  
 14 1256, 1267 (W.D. Wash. 2015)); Dkt. 27 at 14 (citing *Rocky Mountain Farmers Union v.*  
 15 *Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013)). If the state law is discriminatory, “‘it is  
 16 unconstitutional unless it serves a legitimate local purpose, and this purpose could not be  
 17 served as well by available nondiscriminatory means.’” Dkt. 27 at 14 (quoting *Rocky*  
 18 *Mountain Farmers Union*, 730 F.3d at 1087).

19 Under the second tier, the parties assert, a state law may violate the dormant  
 20 Commerce Clause even if it does not discriminate against out-of-state entities. Dkt. 21 at  
 21 8; Dkt. 27 at 14. They claim that a state law may do so under the Supreme Court’s  
 22 decision in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Dkt. 21 at 8; Dkt. 27 at 14.

1 Indeed, the Ninth Circuit Court of Appeals has interpreted *Pike* as holding that a state law  
2 violates the dormant Commerce Clause when it “places a ‘significant’ burden on  
3 interstate commerce” such that the law’s “effect on interstate commerce clearly  
4 outweighs [its] local benefits.” *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 452  
5 (9th Cir. 2019).

6 However, after the parties submitted their briefing on Ecology’s Rule 12(c)  
7 motion, the Supreme Court issued its decision in *National Pork Producers*, which  
8 criticized the second tier of this test. In that decision, the Court rejected an argument that,  
9 “[u]nder *Pike*, . . . a court must at least assess the burden imposed on interstate commerce  
10 by a state law and prevent its enforcement if the law’s burdens are clearly excessive in  
11 relation to the putative local benefits.” *Nat’l Pork Producers*, 598 U.S. at 377 (internal  
12 quotation marks omitted). The Court reasoned that this argument “overstate[s] the extent  
13 to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core  
14 of [its] dormant Commerce Clause jurisprudence.” *Id.*

15 The Court clarified that the dormant Commerce Clause essentially “prohibits the  
16 enforcement of state laws driven by . . . economic protectionism—that is, regulatory  
17 measures designed to benefit in-state economic interests by burdening out-of-state  
18 competitors.” *Nat’l Pork Producers*, 598 U.S. at 369 (internal quotation marks omitted)  
19 (quoting *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008)). The  
20 Court emphasized that “this antidiscrimination principle lies at the ‘very core’ of [its]  
21 dormant Commerce Clause jurisprudence.” *Nat’l Pork Producers*, 598 U.S. at 369  
22

1 (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581  
2 (1997)).

3 The Court explained that, “if some of [its] cases focus on whether a state law  
4 discriminates on its face, the *Pike* line serves as an important reminder that a law’s  
5 practical effects may also disclose the presence of a discriminatory purpose.” *Nat’l Pork*  
6 *Producers*, 598 U.S. at 377. Put differently, “*Pike* serves to “‘smoke out’ a hidden’  
7 protectionism.” *Id.* at 379 (quoting parenthetically R. Fallon, *The Dynamic Constitution*  
8 311 (2d ed. 2013)). Thus, the dormant Commerce Clause is generally “concern[ed] with  
9 preventing purposeful discrimination against out-of-state economic interests.” *Nat’l Pork*  
10 *Producers*, 598 U.S. at 371.

11 Nevertheless, the Supreme Court acknowledged it “has left the ‘courtroom door  
12 open’ to challenges premised on ‘even nondiscriminatory burdens,’” and that ““a small  
13 number of [its] cases have invalidated state laws . . . that appear to have been genuinely  
14 nondiscriminatory.”” *Nat’l Pork Producers*, 598 U.S. at 371 (quoting *Davis*, 553 U.S. at  
15 353; *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997)). “Often, such cases  
16 have addressed state laws that impose burdens on the arteries of commerce, on trucks,  
17 trains, and the like.” *Nat’l Pork Producers*, 598 U.S. at 392 (Sotomayor, J., concurring)  
18 (internal quotation marks omitted). And at least one case invalidated a nondiscriminatory  
19 state law that regulated tender offers to shareholders. *Id.* (Sotomayor, J., concurring)  
20 (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 643–46 (1982)).

21 Therefore, with few exceptions, a state law violates the dormant Commerce  
22 Clause only if it “discriminates against out-of-state entities on its face, in its purpose, or

1 in its practical effect, . . . unless it ‘serves a legitimate local purpose, and this purpose  
 2 could not be served as well by available nondiscriminatory means.’” *Rocky Mountain*  
 3 *Farmers Union*, 730 F.3d at 1087 (quoting *Maine v. Taylor*, 447 U.S. 131, 138 (1986));  
 4 accord *Nat’l Pork Producers*, 598 U.S. at 377–81.

5 **C. Plaintiffs lack constitutional standing to advance their asserted dormant**  
 6 **Commerce Clause claims.**

7 Having clarified the applicable test, the Court considers whether Plaintiffs have  
 8 constitutional standing to advance their asserted dormant Commerce Clause claims. *See*  
 9 *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1265 (9th Cir. 1999) (“[F]ederal courts  
 10 are required sua sponte to examine jurisdictional issues such as standing.”).

11 “In order to have standing to sue in federal court, Article III of the Constitution of  
 12 the United States requires that a complainant have,” among other things, “suffered an  
 13 injury in fact, which the Supreme Court has defined as the invasion of a concrete,  
 14 imminent, and legally cognizable interest.”<sup>7</sup> *Sargeant v. Dixon*, 130 F.3d 1067, 1069  
 15 (D.C. Cir. 1997); accord *Clark v. City of Lakewood*, 259 F.3d 996, 1011 n.7 (9th Cir.  
 16 2001). This requires the plaintiff to “allege a distinct and palpable injury to *himself*.”  
 17 *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (emphasis added).

18 In determining whether Invenergy or Grays Harbor Energy LLC has constitutional  
 19 standing to advance the asserted dormant Commerce Clause claims, the Court first  
 20 clarifies which of these entities owns the electricity generating facility at issue: the Grays

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21 <sup>7</sup> A plaintiff must also establish that the injury is fairly traceable to the challenged action  
 22 of the defendant, and that it is likely, not merely speculative, that the alleged injury will be  
 redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

1 Harbor Energy Center. Plaintiffs wrongly assert that Invenergy owns it. The core of  
 2 Plaintiffs’ dormant Commerce Clause claims is that, “[u]nder the [CCA], local electric  
 3 utilities receive free, no-cost allowances, which enables them to run their plants without  
 4 regard to the greenhouse-gas emissions they produce” whereas “Invenergy Thermal LLC  
 5 (“Invenergy”)<sup>1</sup>, an out-of-state owner, on the other hand, must pay for its carbon.” Dkt.  
 6 27 at 6. The footnote in this sentence states that, because “Invenergy wholly owns Grays  
 7 Harbor Energy LLC, . . . both Plaintiffs are collectively referred to as ‘Invenergy’ for  
 8 purposes of this brief.” *Id.* at 6 n.1.

9 This is misleading. Grays Harbor Energy LLC—not Invenergy Thermal LLC—  
 10 “wholly owns the Grays Harbor Energy Center.” Dkt. 1, ¶ 3. It is immaterial that a  
 11 subsidiary (Invenergy Grays Harbor LLC) of a subsidiary (Invenergy Grays Harbor  
 12 Holdings LLC) of Invenergy owns Grays Harbor Energy LLC. “A basic tenet of  
 13 American corporate law is that the corporation and its shareholders are distinct entities.”  
 14 *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Accordingly, “[a] corporate  
 15 parent which owns the shares of a subsidiary does not, for that reason alone, own or have  
 16 legal title to the assets of the subsidiary; and, it follows with even greater force, the parent  
 17 does not own or have legal title to the subsidiaries of the subsidiary.” *Id.* at 475. It  
 18 therefore follows with yet even greater force that a corporate parent (here, Invenergy)  
 19 does not own or have legal title to the *assets* of a subsidiary that is *three degrees*  
 20 separated from itself (here, Grays Harbor Energy LLC). The Court rejects Plaintiffs’  
 21 implicit contention otherwise.  
 22

1 Because Invenergy does not own the Grays Harbor Energy Center, *see Dole Food*,  
2 538 U.S. at 474–75, it fails to allege an injury to itself by the CCA’s allocation of no-cost  
3 allowances to electric utilities, but not to electricity generating facilities like the Grays  
4 Harbor Energy Center. *See Warth*, 422 U.S. at 501. The Ninth Circuit has similarly held  
5 that a subsidiary that “does not contend that the rights [at issue] belong to it, but to its  
6 parent company,” “fails to establish standing.” *Aschley Creek Properties, L.L.C. v.*  
7 *Larson*, 403 Fed. App’x 273, 274 (9th Cir. 2010) (citing *Dole Food*, 538 U.S. at 474–  
8 475)).<sup>8</sup> Under *Dole Food*, the inverse must also be true: a corporate parent that does not  
9 own the asset at issue because it is wholly owned by a subsidiary also fails to establish  
10 standing. *See* 538 U.S. at 475. Therefore, Invenergy does not have constitutional standing  
11 to advance the asserted dormant Commerce Clause claims.

12 Nor does Grays Harbor Energy LLC. The complaint concedes that Grays Harbor  
13 Energy LLC is an *in-state* entity, not an out-of-state entity. It is headquartered in Grays  
14 Harbor County, Washington, Dkt. 1, ¶ 20, and appears to exist primarily, if not solely, to  
15 operate the Grays Harbor Energy Center, which is also located in Grays Harbor County.  
16 *Id.* ¶ 26. Moreover, “[t]he vast majority of the electricity that Grays Harbor generates is  
17 sold to entities within Washington.” *Id.* ¶ 38. There is no indication that Grays Harbor  
18 Energy LLC does anything but “own and operate the Grays Harbor Energy Center.” *Id.*

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21 <sup>8</sup> Although they are not binding precedent, unpublished dispositions of the Ninth Circuit  
22 issued on or after January 1, 2007, may be cited in accordance with Federal Rule of Appellate  
Procedure 32.1. Ninth Cir. R. 36-3(a)–(b).

1        Given these concessions, Grays Harbor Energy LLC does not plead a plausible  
2        “invasion” of a “legally cognizable interest” under the dormant Commerce Clause.  
3        *Sargeant*, 130 F.3d at 1069. Its alleged injury under both of its dormant Commerce  
4        Clause claims is that “the CCA’s distribution of no-cost allowances deprives [it] of the  
5        rights, privileges, and immunities under the Commerce Clause.” Dkt. 1, ¶¶ 171, 182. But  
6        the dormant Commerce Clause generally prohibits state “regulatory measures designed to  
7        benefit *in-state* economic interests by burdening *out-of-state* competitors.” *Nat’l Pork*  
8        *Producers*, 598 U.S. at 369 (internal quotation marks omitted and emphasis added)  
9        (quoting *Davis*, 553 U.S. at 337–38).

10       The Court is mindful that a “cognizable injury from unconstitutional  
11       discrimination against interstate commerce does not stop at members of the class against  
12       whom a State discriminates.” *Tracy*, 519 U.S. at 286. Beyond this, for example,  
13       “customers of that class may also be injured,” such as when a “customer is liable for  
14       payment of [a] tax and as a result presumably pays more for the gas it gets from out-of-  
15       state producers and marketers.” *Id.*

16       No such scenario exists here. Grays Harbor Energy LLC does not identify *any* out-  
17       of-state economic interest of its own against which the CCA *could* discriminate. It also  
18       does not even claim to be burdened as the customer of any discriminated-against out-of-  
19       state entity, or to be burdened in any similar way. *See Tracy*, 519 U.S. at 286.  
20       Accordingly, Grays Harbor Energy LLC also fails to allege a plausible injury in fact  
21       under the dormant Commerce Clause.  
22

For these reasons, both Invenergy and Grays Harbor Energy LLC lack constitutional standing to advance their asserted dormant Commerce Clause claims. Because their deficiencies cannot be cured through the allegation of other facts, these claims are **DISMISSED with prejudice**. *See Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 824 (9th Cir. 2002) (dismissal with prejudice on standing was appropriate when appellant “could not have possibly amended his complaint to allege an [Article III] injury in fact”); *accord Fieldturf, Inc. v. Sw. Recreational Indus., Inc.*, 357 F.3d 1266, 1269 (Fed. Cir. 2004) (“Ordinarily, dismissal for lack of standing is without prejudice. On occasion, however, a dismissal with prejudice is appropriate, especially where ‘it [is] plainly unlikely that the plaintiff [will be] able to cure the standing problem.’” (internal citation omitted) (quoting *H.R. Tech. v. Astechnologies, Inc.*, 275 F.3d 1378, 1385 (Fed. Cir. 2002))).

**D. Even if Plaintiffs had standing to advance their asserted dormant Commerce Clause claims, these claims would fail on the merits.**

Even if either Invenergy or Grays Harbor Energy LLC had standing to advance the asserted dormant Commerce Clause claims, these claims would still fail for numerous reasons.

**1. Plaintiffs’ claim that the CCA imposes an excessive burden on interstate commerce in relation to the putative local benefits is meritless.**

Plaintiffs claim that the CCA’s allocation of no-cost allowances to electric utilities, but not to electricity generating facilities, violates the dormant Commerce Clause by “excessively burden[ing] interstate commerce without advancing any legitimate local interest.” Dkt. 1, ¶ 174. As explained, however, the Supreme Court

recently rejected a similar argument, explaining that it “overstate[s] the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of [its] dormant Commerce Clause jurisprudence.” *Nat’l Pork Producers*, 598 U.S. at 377. This claim accordingly lacks merit.<sup>9</sup>

**2. Plaintiffs’ claim that the CCA discriminates against out-of-state economic interests is not plausible.**

Plaintiffs also claim that the CCA’s allocation of no-cost allowances to electric utilities violates the dormant Commerce Clause “by discriminating in effect against out-of-state economic interests to the benefit of in-state economic interests.” Dkt. 1, ¶ 157. To reiterate, a state statute violates the dormant Commerce Clause if it “discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, . . . unless it ‘serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.’” *Rocky Mountain Farmers Union*, 730 F.3d at 1087 (quoting *Taylor*, 447 U.S. at 138); accord *Nat’l Pork Producers*, 598 U.S. at 377–81. The CCA does not discriminate in any of these respects.

**a. The CCA does not discriminate against out-of-state entities on its face.**

The CCA does not discriminate against out-of-state entities on its face because electric utilities and electricity generating facilities are not substantially similar entities. “Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities.” *Tracy*, 519 U.S. at 298. When “different entities serve

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<sup>9</sup> Plaintiffs do not claim that the CCA burdens the “arteries” of interstate commerce. *Nat’l Pork Producers*, 598 U.S. at 392 (Sotomayor, J., concurring). The Court, therefore, does not consider any such claim.

1 different markets,” they “would continue to do so even if the supposedly discriminatory  
2 burden were removed.” *Id.* at 299. “If in fact that should be the case, eliminating the . . .  
3 regulatory differential would not serve the dormant Commerce Clause’s fundamental  
4 objective of preserving a national market for competition undisturbed by preferential  
5 advantages conferred by a State upon its residents or resident competitors.” *Id.*

6 Plaintiffs concede that “[e]lectric utilities and electricity generating facilities  
7 occupy distinct positions in electricity markets.” Dkt. 1, ¶ 7. Whereas “[a]n electric utility  
8 distributes and delivers electricity to the public” on the retail market, electricity  
9 generating facilities like the Grays Harbor Energy Center do not. *Id.* They instead sell  
10 electricity on the wholesale market, which includes selling electricity *to* electric utilities.  
11 *See id.* (“Independent power producers . . . regularly sell the electricity generated by their  
12 facilities to electric utilities as well as some end-users.”). Electric utilities are also subject  
13 to various statutory and regulatory requirements that electricity generating facilities are  
14 not, such as CETA. *See generally* chapter 19.405 RCW.

15 Plaintiffs contend that, because “many utilities own and operate power plants and  
16 other types of electricity generating facilities,” Dkt. 1, ¶ 7, electric utilities and non-  
17 utility-operated electricity generating facilities “compete against each other as power-  
18 plant owners.” Dkt. 27 at 10. In this sense, Plaintiffs argue, the CCA unlawfully  
19 discriminates against electricity generating facilities because electric utilities “will use  
20 [their no-cost allowances] to cover their plants’ compliance obligations.” *Id.* at 18.

21 It is true that electric utilities may request Ecology to transfer their no-cost  
22 allowances to electricity generating facilities that they operate. WAC 173-446-420(2)(a).

1 However, the CCA’s allocation of no-cost allowances to electric utilities must be tailored  
 2 to the amount of electricity that a utility supplies to the public on the retail market—a  
 3 captive market in which electricity generating facilities do not participate. *See* RCW  
 4 70A.65.120(2)(b), (c), (d) (stating that the allocation of no-cost allowances to electric  
 5 utilities “must be consistent with a forecast . . . of each utility’s *supply and demand*, and  
 6 the cost burden resulting from the inclusion of” covered entities for each compliance  
 7 period (emphasis added)); WAC 173-446-230(2)(a) (“Ecology will use utility-specific  
 8 demand forecasts that provide estimates of *retail* electric load.” (Emphasis added)).<sup>10</sup>

9 As Ecology persuasively asserts: “Because the supply of no-cost allowances is  
 10 finite and directly tied to the power a utility supplies to its retail customers, any power  
 11 created by a utility’s generating facilities that does not serve this load—i.e., bulk power  
 12 sold on the wholesale market—does not increase a utility’s allocation of no-cost  
 13 allowances.” Dkt. 30 at 5. As a result, the allocation of no-cost allowances applies  
 14 primarily to grant electric utilities a benefit in the captive market.

15 To modify this scheme “could subject [utilities] to economic pressure that in turn  
 16 could threaten the preservation of an adequate customer base to support the continued  
 17 provision of bundled services to the captive market.” *Tracy*, 519 U.S. at 309. This is  
 18 significant, particularly because “the States’ interest in protecting the captive market from  
 19 the effects of competition for the largest consumers is underscored by the common sense  
 20

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21 <sup>10</sup> The complaint acknowledges this, stating that, under the CCA, electric utilities “will  
 22 receive enough no-cost allowances to cover the emissions *associated with the electricity they sell*  
*to consumers in Washington.*” Dkt. 1, ¶ 9 (emphasis added).

1 of our traditional recognition of the need to accommodate state health and safety  
2 regulation in applying dormant Commerce Clause principles.” *Id.* at 306. By comparison,  
3 “[s]tate regulation of natural gas sales to consumers,” for instance, “serves important  
4 interests in health and safety in fairly obvious ways, in that requirements of dependable  
5 supply and extended credit assure that individual buyers of gas for domestic purposes are  
6 not frozen out of their houses in the cold months.” *Id.* The same is true of state regulation  
7 of electricity sales.

8       The Court accordingly “give[s] the greater weight to the captive market and the  
9 . . . utilities’ singular role in serving it,” and, thus, treats electric utilities and electricity  
10 generating facilities “as dissimilar for present purposes.” *Tracy*, 519 U.S. at 304; *accord*  
11 *NextEra Energy*, 48 F.4th at 320 (“*Tracy* prevented classifying a law as textually  
12 discriminatory . . . because it applied primarily to grant utilities a tax preference in a  
13 market where they were monopolies.”). Put differently, because the CCA does “not  
14 discriminate on the basis of a company’s business contacts with the state, but rather on  
15 the basis of its status” as either an electric utility or electricity generating facility, “the  
16 statute d[oes] not offend the dormant Commerce Clause.” *Allstate Ins. Co. v. Abbott*, 495  
17 F.3d 151, 162 (5th Cir. 2007), *cert. denied*, 552 U.S. 1184 (2008); *accord Exxon Corp. v.*  
18 *Governor of Maryland*, 437 U.S. 117, 127 (1978) (the dormant Commerce Clause does  
19 not “protect[] the particular structure or methods of operation in a retail market”).

20       Therefore, the challenged statute does not discriminate against out-of-state  
21 economic interests on its face.  
22

1       **b.       The CCA does not discriminate against out-of-state entities in its**  
2       **purpose.**

3       The allocation of no-cost allowances to electric utilities, but not to electricity  
4       generating facilities, does not discriminate against out-of-state entities in its purpose. The  
5       challenged statute states that “[t]he legislature intends by this section to allow all  
6       consumer-owned electric utilities and investor-owned electric utilities subject to the  
7       requirements of chapter 19.405 RCW, the Washington clean energy transformation act, to  
8       be eligible for allowance allocation as provided in this section *in order to mitigate the*  
9       *cost burden of the program on electricity customers.*” RCW 70A.65.120(1) (emphasis  
10      added). This express purpose plainly does not discriminate against out-of-state economic  
11      interests.

12       **c.       The CCA does not discriminate against out-of-state entities in effect.**

13      The CCA also does not discriminate in effect. Most importantly, Plaintiffs do not  
14      articulate how the CCA discriminates in effect against *any* legally cognizable out-of-state  
15      economic interest; again, Grays Harbor Energy LLC—the sole owner of the Grays  
16      Harbor Energy Center—is an in-state entity that produces and sells its own electricity in  
17      Washington. Separately, because electricity generating facilities and electric utilities are  
18      not substantially similar entities for Commerce Clause purposes, the CCA’s differing  
19      treatment of them does not discriminate in effect. For each of these reasons alone, the  
20      CCA’s allocation of no-cost allowances to electric utilities does not discriminate in  
21      effect.  
22

1 Plaintiffs additionally fail to plausibly allege that PacifiCorp, the owner of an  
 2 electric utility in Washington that is entitled to no-cost allowances under the CCA, is an  
 3 in-state entity. Plaintiffs acknowledge that PacifiCorp “is headquartered in Oregon,” Dkt.  
 4 1, ¶ 48 n.8, yet they allege that it is an in-state entity because it “conduct[s] significant  
 5 commercial and political activities in Washington.” *Id.* ¶ 48; *see also* Dkt. 27 at 10–11.  
 6 According to Plaintiffs, “extensive practical connections” to a State, “not corporate  
 7 formalities, inform whether an entity is an in-state economic interest.” Dkt. 27 at 16  
 8 (citing *NextEra Energy*, 48 F.4th at 322–24).

9 The Court is not persuaded that, under these circumstances, an entity  
 10 headquartered out-of-state qualifies as an in-state entity for dormant Commerce Clause  
 11 purposes simply because it “conducts significant commercial and political activities in  
 12 Washington.”<sup>11</sup> Dkt. 1, ¶ 48. The plaintiffs in *National Pork Producers*, for example,  
 13 were out-of-state entities because they produced pork outside of California, even though  
 14 “California imports almost all the pork it consumes.” 598 U.S. at 367. In this way, those  
 15 plaintiffs undoubtedly conducted significant commercial activities in California. The  
 16

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17 <sup>11</sup> Ecology asserts that the Eighth Circuit has “reject[ed] the argument that an out-of-state  
 18 company with permanent in-state operations is an in-state interest for Commerce Clause  
 19 purposes.” Dkt. 30 at 8 (citing *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018,  
 20 1027–29 (8th Cir. 2020), *cert. denied*, \_\_ U.S. \_\_, 141 S. Ct. 1510 (2021)). In the cited case,  
 21 however, the Eighth Circuit declined to address this issue, stating: “[W]e have not squarely  
 22 addressed the issue of whether an entity that has an in-state presence but is headquartered  
 elsewhere is considered an in-state entity for the purpose of dormant Commerce Clause review.  
 We need not do so now.” *LSP Transmission Holdings*, 954 F.3d at 1029 n.7. Nevertheless, the  
 court noted “that it would be somewhat awkward to label a [state] law as discriminatory despite  
 benefitting a company that has an operation in [the State] but is principally located or  
 headquartered elsewhere.” *Id.*

1 Court also fails to see the relevance in this case of an entity’s political activities in  
2 Washington for determining whether it is an in-state entity.

3 Plaintiffs rely on *NextEra Energy*. There, the Fifth Circuit made several statements  
4 that, when read outside the specific context of that case, may appear to support Plaintiffs’  
5 proposed standard. For instance, the court stated that, “[f]or the concern about in-state  
6 interests being able to obtain favorable treatment over out-of-state interests, local  
7 presence, rather than place of incorporation, should matter.” *NextEra Energy*, 48 F.4th at  
8 323. The court also questioned: “Which business is more likely to have the clout to enact  
9 protectionist measures: a Delaware corporation that employs thousands of workers in a  
10 state, or a company that paid a nominal filing fee to be incorporated in state but has its  
11 ‘principal operations’ elsewhere?” *Id.* The court answered: “[W]here a company is  
12 ‘based’ is not controlling, and the underlying concern about local clout leading to  
13 protectionist legislation, a law can discriminate against interstate commerce even though  
14 most of the” entities that benefit from the law “are incorporated or headquartered”  
15 elsewhere. *Id.* at 323–24.

16 Yet “[t]he language of an opinion is not always to be parsed as though we were  
17 dealing with language of a statute.” *Nat’l Pork Producers*, 598 U.S. at 373 (quoting  
18 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)). “Instead, . . . opinions dispose of  
19 discrete cases and controversies and they must be read with a careful eye to context.”  
20 *Nat’l Pork Producers*, 598 U.S. at 373–74.

21 *NextEra Energy* in inapposite. It concerned a Texas statute which provided that  
22 “the ability to build, own, or operate new [transmission] lines ‘that directly [connect]

1 with an existing utility facility . . . may be granted only to the owner of that existing  
2 facility.’” *NextEra Energy*, 48 F.4th at 310 (second and third alterations in original)  
3 (quoting TEX. UTIL. CODE § 37.056(e)). Under that statute, “the only way a company  
4 without a Texas presence can build, operate, or own transmission lines is to buy a utility  
5 that already owns a power facility in the state.” *Id.* at 314.

6 The Fifth Circuit found it irrelevant that “most of the in-state incumbents [the  
7 statute] protects are incorporated [or headquartered] outside Texas.” *Id.* at 322. It  
8 explained that “[w]hat matters instead is that the Texas law prevents those without a  
9 presence in the state from ever entering the portions of the interstate transmission market  
10 that cross into Texas.” *Id.* at 324. Because “[a] law that ‘discriminates among affected  
11 business entities according to the extent of their contacts with the local economy’ may  
12 violate the Commerce Clause,” *id.* (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27,  
13 42 (1980)), the Fifth Circuit held that the statute discriminated against out-of-state  
14 economic interests. *Id.* at 326.

15 The CCA does nothing of the sort. Plaintiffs do not claim that the CCA, for  
16 example, limits the ownership of electric utilities or electricity generating facilities to  
17 entities with an existing presence in Washington, or otherwise imposes a burden on  
18 entities without an existing presence in the State. Therefore, Plaintiffs’ reliance on  
19 *NextEra Energy* is misplaced.

20 Aside from failing to plausibly allege that PacifiCorp is an in-state owner of an  
21 electric utility, Plaintiffs also fail to adequately account for two in-state owners of  
22 electricity generating facilities. Specifically, the University of Washington (UW) and

1 Washington State University (WSU) own and operate electricity generating facilities,  
 2 Dkt. 22-3,<sup>12</sup> that appear to generate more than 25,000 metric tons of carbon dioxide  
 3 equivalent per year. *See* Dkt. 22-4 at 2 (stating that, in 2021, UW’s total emissions  
 4 amounted to 89,624 metric tons of carbon dioxide equivalent, and WSU’s total emissions  
 5 amounted to 62,454 metric tons of carbon dioxide equivalent). This would make these  
 6 facilities “covered entities” under the CCA. *See* RCW 70A.65.010(23); WAC 173-446-  
 7 030; WAC 173-446-060. Because these in-state owners of electricity generating facilities  
 8 also appear to be subject to the CCA and not entitled to no-cost allowances, Plaintiffs’  
 9 claim that the CCA discriminates in effect fails.

10 Plaintiffs argue that “the data [Ecology] provides do not identify whether these  
 11 power plants produced the recorded emissions.” Dkt. 27 at 8 n.3. But Ecology  
 12 convincingly replies that “there is no other conceivable activity under which either UW  
 13 or WSU would generate large quantities of greenhouse gas emissions of the type covered  
 14 by the CCA *but for* these facilities.” Dkt. 31 at 2; *see Vasquez*, 487 F.3d at 1249 (on a  
 15 motion to dismiss, plaintiffs are not entitled to unwarranted inferences in their favor). In  
 16 any event, *Plaintiffs* bear the burden of pleading a plausible claim, *see Iqbal*, 556 U.S. at  
 17

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18 <sup>12</sup> Pursuant to Federal Rule of Evidence 201, Ecology requests the Court to take judicial  
 19 notice of six documents filed with various federal and state agencies. Dkt. 22 at 1–3. Plaintiffs do  
 20 not object to the Court taking judicial notice of five of these documents. Dkt. 28 at 1. However,  
 21 they oppose the Court taking judicial notice of one of these documents—an excerpt of a  
 22 Washington greenhouse gas reporting program publication, Dkt. 22-4— “to the extent that  
 Defendant claims [the emissions data in this publication] provide a basis for the Court to  
 conclude these universities’ power plants qualify as covered entities under the [CCA].” *Id.* at 1–  
 4. This argument essentially asks the Court to not make an unwarranted inference from the  
 disputed document. It does not concern whether the Court may take judicial notice of the  
 document itself. Accordingly, the Court takes judicial notice of all six documents.

1 678, and they do not plausibly allege that these in-state electricity generating facilities are  
2 not subject to the CCA.

3 Plaintiffs also argue that Ecology “has offered no evidence that these power plants  
4 compete against Grays Harbor and the twelve other power plants identified in [the]  
5 Complaint.” Dkt. 27 at 8 n.3. But again, Plaintiffs bear the burden of pleading a plausible  
6 claim. *See Iqbal*, 556 U.S. at 678. Their failure to allege any facts indicating that the  
7 Grays Harbor Energy Center does not compete in any way against these facilities is  
8 another deficiency in their complaint. Although this particular deficiency might be  
9 curable through further amendment, the others are not.

10 In sum, regardless of whether an electric utility is owned by an in-state entity or an  
11 out-of-state entity, the CCA treats that utility the same as any other electric utility: it is  
12 entitled to no-cost allowances. Similarly, regardless of whether an electricity generating  
13 facility is owned by an in-state entity or an out-of-state entity, the CCA treats that facility  
14 the same as any other electricity generating facility: it is not entitled to no-cost  
15 allowances. Plaintiffs accordingly fail to plausibly allege that the CCA’s allocation of no-  
16 cost allowances to electric utilities, but not to electricity generating facilities,  
17 discriminates against out-of-state economic interests.

18 For these reasons, even if Plaintiffs had standing to advance their dormant  
19 Commerce Clause claims, these claims would fail on the merits. Because these claims  
20 could not be cured through further amendment, they would be dismissed with prejudice.  
21 *See Cook, Perkiss & Liehe*, 911 F.2d at 247.

**E. Plaintiffs’ claim under the Equal Protection Clause of the Fourteenth Amendment also fails.**

Plaintiffs allege that the CCA’s allocation of no-cost allowances to electric utilities, but not to electricity generating facilities like the Grays Harbor Energy Center, violates the Equal Protection Clause of the Fourteenth Amendment by “treat[ing] independent power plant owners differently from other similarly situated plant owners, namely local utilities,” in a manner that “is not rationally related to any legitimate governmental purpose.” Dkt. 1, ¶ 187.

Ecology asserts that this “claim fails for the simple reason that there is no discrimination to begin with.” Dkt. 21 at 21. It also contends that, “even if Plaintiffs were similarly situated and differently treated, Plaintiffs still cannot meet their burden to negate the Legislature’s policy determination.” *Id.*

Plaintiffs respond that, “[a]s power-plant owners,” they are “materially the same” as the utilities that benefit under the CCA—each “own and operate power plants that generate indistinguishable electricity in more-or-less the same manner.” Dkt. 27 at 27. Plaintiffs also argue that the CCA’s allocation of no-cost allowances to electric utilities does not bear a rational relation to a legitimate end because it actually “increas[es] both greenhouse-gas emissions and electricity costs.” *Id.* at 28.

Under the Equal Protection Clause of the Fourteenth Amendment, “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. In essence, the clause “mandates that similarly situated persons be treated alike.” *Nw. Grocery Ass’n v. City of Seattle*, 526 F. Supp. 3d 884, 893 (W.D.

1 Wash. 2021) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). “[I]f a law neither burdens  
2 a fundamental right nor targets a suspect class, [courts] will uphold the legislative  
3 classification so long as it bears a rational relation to some legitimate end.” *Romer v.*  
4 *Evans*, 517 U.S. 620, 631 (1996). A law reviewed under the rational basis standard bears  
5 “a strong presumption of validity” and the attacking party has “the burden ‘to negative  
6 every conceivable basis which might support it.’” *F.C.C. v. Beach Commc’ns*, 508 U.S.  
7 307, 314–15 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356,  
8 364 (1973)). Furthermore, a “[l]egislative choice is not subject to courtroom fact-finding  
9 and may be based on rational speculation unsupported by evidence or empirical data.”  
10 *Beach Commc’ns*, 508 U.S. at 113.

11 As an initial matter, the Court concludes that Invenergy lacks constitutional  
12 standing to advance this claim for the same reason that it lacks standing to advance a  
13 claim under the dormant Commerce Clause: it does not own the Grays Harbor Energy  
14 Center and, therefore, does not allege an injury in fact. Because this standing deficiency  
15 cannot be cured through further amendment, Invenergy’s claim under the Fourteenth  
16 Amendment’s Equal Protection Clause is **DISMISSED with prejudice**. See *Schmier*,  
17 279 F.3d at 824 (9th Cir. 2002); *Fieldturf, Inc.*, 357 F.3d at 1269.

18 Next, Grays Harbor Energy LLC fails to allege a plausible claim under the Equal  
19 Protection Clause. Because electric utilities and electricity generating facilities are not  
20 similarly situated, the CCA’s allocation of no-cost allowances to electric utilities does not  
21 discriminate in violation of the Equal Protection Clause. For this reason alone, Grays  
22 Harbor Energy LLC fails to state a plausible claim.

Grays Harbor Energy LLC also fails to plausibly allege that the challenged statute does not bear a rational relation to some legitimate end. Again, the purpose of the CCA's allocation of no-cost allowances to electric utilities is "to mitigate the cost burden of the [cap and invest] program on electricity customers." RCW 70A.65.120(1). There can be no debate that this is a legitimate end. *See Tracy*, 519 U.S. at 306. There is also no doubt that the allocation of no-cost allowances to electric utilities—which sell electricity directly to the public—bears a rational relation to this end. Plaintiffs' complaints that the CCA does not achieve this goal effectively and in reality are immaterial. *See Beach Commc'ns*, 508 U.S. at 113.

Accordingly, Grays Harbor Energy LLC fails to allege a plausible claim under the Fourteenth Amendment's Equal Protection Clause. Because this claim cannot possibly be cured by the allegation of other facts, this claim is **DISMISSED with prejudice**. *See Cook, Perkiss & Liehe*, 911 F.2d at 247.

### III. ORDER

Therefore, it is hereby **ORDERED** that Ecology's motion for a judgment on the pleadings, Dkt. 21, is **GRANTED**. All of Plaintiffs' claims are **DISMISSED with prejudice and without leave to amend**.

The Clerk shall enter a **JUDGMENT** and close the case.

Dated this 3rd day of November, 2023.



BENJAMIN H. SETTLE  
United States District Judge